Nos. 90-1619, 90-1700

Supreme Court, U.S.
FILED
DEC 23 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT BOSTON AND MAINE CORPORATION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the National Rail Passenger Corporation ("Amtrak"), a private for-profit stock corporation, did not have the power, under Section 402(d) of the Rail Passenger Service Act of 1970 ("RPSA"), 45 U.S.C. § 562(d), to condemn more property or a greater property interest than is actually "required for interstate rail passenger service."

2. Whether the court of appeals erred in holding that Amtrak had no power to finance its own operations by condemning the private property of one railroad for the purpose of conveying all of that property to a competing railroad which was willing to contract with Amtrak on more favorable terms.

3. Whether the court of appeals erred in holding that the Interstate Commerce Commission had the statutory responsibility for ensuring that Amtrak did not exceed its limited powers under RPSA § 402(d), and that the Commission's construction effectively exempted Amtrak from any effective review of its condemnation actions.

4. Whether the Commission's construction of Amtrak's exercise of condemnation power in this case—which permits one private party to condemn the property of another private party for the express purpose of conveying it to a third private party, with no public administration and with no change in use—violates the Fifth Amendment of the Constitution.

5. Whether the court of appeals erred in holding that even if Amtrak had such powers, the Commission had failed to resolve important factual disputes and failed to make the necessary predicate factual findings required by the statute.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT BOSTON AND MAINE CORPORATION

Respondent Boston and Maine Corporation respectfully requests that this Court affirm the Court of Appeals for the District of Columbia Circuit's judgment entered on August 10,1990, reported at 911 F.2d 743, and its Order

denying rehearing entered on February 1, 1991, reported at 924 F.2d 427.

STATEMENT[1]

Background

The Connecticut River Line ("Conn River Line") is a rail line running between Springfield, Massachusetts, and White River Junction, Vermont. Prior to this controversy, Boston and Maine Corporation ("Boston & Maine" or "B&M") owned large stretches of the Conn River Line, while Central Vermont Railroad ("Central Vermont" or "CV"), its long-time competitor for freight rail business in New England, owned the remainder. Each had the right to run over the others' rails in accordance with a trackage rights agreement between them dating back to 1930. Pet. App. 9a.

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[1] Because of the way the Commission construed the statute involved, it did not find it necessary to make certain findings and resolve many of the critical factual disputes that were presented to it. Also, in some instances, the Commission's preliminary procedural decisions (Pet. App. 119a, 113a, 110a)—aspects of which are reiterated in its final decision (Pet. App. 29a)—contain statements regarding hotly contested issues w ch were made solely on the basis of references to the petitions for r ef filed by Amtrak and Central Vermont. The Commission reached these decisions prior to any hearing or evidentiary proceeding.

Many of the "facts" set forth in the briefs of Petitioners Amtrak and Central Vermont and Respondents State of Vermont and Commonwealth of Massachusetts were not found by the Commission and are disputed. They are referenced to various Verified Statements filed by the parties in the Commission proceedings. While there are many facts that are not in dispute, there are numerous important factual issues that were not resolved by the Commission. These will be discussed in the Argument, *infra*. However, in order to place the factual background in proper perspective, Respondent Boston & Maine may refer to Verified Statements and materials submitted to the Commission, which, as in the case of Petitioners Amtrak and Central Vermont and Respondents State of Vermont and Commonwealth of Massachusetts, did not make their way into Commission findings.

At White River Junction, Vermont, the Conn River Line connects with that of the Canadian National Railway Company ("CN"), which continues on to Montreal, Quebec. At Wells River, Vermont, the Conn River Line connects with Canadian Pacific ("CP"), whose lines proceed north and into eastern Canada. The Conn River Line is an integral part of a larger line linking both Canadian rail systems (CN and CP) to U.S. rail carriers in the Northeast. J.A. 63-64; Pet. App. 9a. CN is the parent company of Central Vermont, and the chief competitor of CP.

In 1982, the Interstate Commerce Commission (the "ICC" or the "Commission") approved the acquisition of Boston & Maine out of bankruptcy reorganization by Guilford Transportation Industries, Inc., owner of the Maine Central Railroad. *See Guilford Transp. Indus., Inc.—Control—Boston and Maine Corp.*, 366 I.C.C. 294 (1982), *aff'd in part and rev'd in part sub nom. Lamoille Vally R.R. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983).[2]

The Dispute With Amtrak

In 1972, Amtrak began using the Conn River Line to provide a passenger train (the "Montrealer") between Montreal and Washington, D.C. Sometime in 1986, Amtrak became concerned about the speeds—sufficient for Boston & Maine's freight traffic—that the track condition required of Amtrak's passenger trains. J.A. 103. Boston & Maine deemed speeds of 25 miles per hour or less as sufficient for its freight operation, but Amtrak demanded that Boston & Maine maintain the track to a degree sufficient to allow passenger trains to operate at speeds of up to 60 miles per hour. Pet. App. 9a. The difference in maintenance costs between these two speeds was approximately $400,000 per year. Pet. App. 10a.

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[2] CV tried to block the acquisition of B&M out of bankruptcy, an attempt that was rejected by the Commission, whose decision was affirmed by the D.C. Circuit. *See Central Vermont Ry. v. ICC*, 711 F.2d 331 (D.C. Cir. 1983).

In the fall of 1986 and spring of 1987, Amtrak and B&M representatives were involved in ongoing discussions concerning the upgrading of the Conn River Line and the desirability of seeking an appropriation of federal funds to underwrite the cost of the necessary work. J.A. 103. About that time, Amtrak and B&M became involved in a dispute over the responsibility for the cost of upgrading the tracks. J.A. 107-08. B&M took the position that it would cooperate in the project to upgrade the tracks provided that Amtrak agreed to pay its share of the costs associated with maintaining tracks suitable for fast passenger trains. J.A. 107.

In April 1987, flooding of the Connecticut River caused B&M to suspend all service on the Conn River Line for several days. J.A. 104. When the flood waters subsided, B&M resumed its freight operations over the Conn River Line and authorized the resumption of passenger service. *Id.* Amtrak abruptly decided that it would no longer operate the Montrealer. Amtrak contended that it had stopped running the Montrealer due to the allegedly poor condition of Conn River Line although the condition of the track was the same after the flooding as it had been before the flooding. *Id.*[3]

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[3] Amtrak instituted an arbitration proceeding on April 24, 1987, under a trackage rights agreement that had been entered into with the trustee in bankruptcy during the reorganization proceedings. B&M contended that the agreement had been terminated. The Arbitration Panel initially determined that the trackage rights agreement continued in existence until August 4, 1987, and that B&M had not used its "best" efforts to maintain the tracks in accordance with the trackage rights agreement but awarded no relief to Amtrak. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, NAP Cases Nos. 72 & 74, Opinion and Order (Nat'l Arb. Panel Nov. 7, 1988).

The arbitration proceedings were held in abeyance during the course of the Commission proceedings, involved herein, and during the appeal to the court of appeals. Ultimately, they were resumed with respect to the segment of the Conn River Line owned by B&M and not part of the condemnation proceedings. On March 9, 1990, the Arbitration Panel ruled that if Amtrak desired to use the B&M southern segment

In July 1987, Congress appropriated $5 million for the rehabilitation of two B&M segments of the Conn River Line from Springfield, Massachusetts, through Vermont. The funds were designated "only for construction, rehabilitation, renewal, replacement, or other improvements deemed by [Amtrak] to be needed to enable it to restore railroad passenger service between Springfield, Massachusetts and Montreal, Canada through Vermont." Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447. B&M was the owner of the line at the time Congress made the appropriation.

The Amtrak–Central Vermont Agreements

At some unknown point in time in 1987, Amtrak began negotiations with Central Vermont. By September 1987—a full six months before Amtrak filed the condemnation petition at issue in this proceeding—Amtrak and CV had retained consultants to appraise the B&M portion of the

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it would have to contribute to B&M the $1.8 million out of the $5 million appropriated by Congress for the upgrade and maintenance of the line. The panel also ruled that, since the prior trackage rights agreement had terminated, Amtrak would have to apply to the Commission under Section 402(a) for authority to use B&M's tracks and on such terms and for such compensation as the Commission may fix as just and reasonable. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, NAP Cases Nos. 72 & 74, Further Opinion and Order (Nat'l Arb. Panel March 9, 1990).

During the course of the arbitration proceeding, and while B&M was contending that the 1977 trackage rights agreement had been terminated, B&M amended its System Diagram Map to include the Conn River Line in the category of track anticipated to be the subject of an abandonment or discontinuance petition within the next three years. Pet. App. 122a. When Amtrak instituted the condemnation proceeding, B&M removed the Conn River Line from such designation. *Id.* "Designation" of a rail line for abandonment on a system diagram map filed with the Commission is merely a notification that a line *may* be abandoned at some point in the future. *See* 49 C.F.R. § 1152.10 (1990). Nothing happens, however, until a carrier applies to the Commission to begin an abandonment proceeding. *See id.*, §§ 1152.20-1152.50. No abandonment proceeding was ever begun by Boston & Maine.

Conn River Line. *See* Deferred Appendix, *Boston & Maine Corp. v. ICC*, 911 F.2d 743 (D.C. Cir. 1990), at 803 (Rebuttal Testamony of Walter R. Ernst); *id.* at 1149-50 (Verified Statement of James Thetford). By early January 1988, the negotiations between Amtrak and Central Vermont had reached an agreement in principle which is recorded in an internal Central Vermont memorandum written by Gerald Maas (the president of CV's parent company), dated January 6, 1988. The memorandum outlines the Agreement:

> After exploring a wide range of proposals with Amtrak and the State of Vermont we have decided on a plan to initiate a proceeding in which Amtrak will condemn certain Guilford [*i.e.*, B&M] interests in the line and subsequently assign those interests to CV for purposes of upgrading and operating the line.

J.A. 92. The internal memorandum noted that "Amtrak does not want to own or operate the Line, and has no funds to acquire it," so that the amount of funds necessary would have to come from someone else. J.A. 93. CV anticipated getting the portion of the $5 million that Congress had appropriated for track improvements on the B&M segments. *Id.*

The memorandum outlines the procedures that would be followed in order for CV to gain control of the B&M segments of the Conn River Line. Amtrak was to make a take-it-or-leave-it, $1 million offer, with the money to be provided for that purpose by CV. J.A. 94. "If the offer is not accepted within a specified period (and we have reason to believe Guilford will not accept it), it will be withdrawn." *Id.* Amtrak would then condemn the property and turn the whole line over to CV. J.A. 92.

In furtherance of this scheme, Amtrak sent a letter to B&M, dated March 18, 1988, offering to buy the segment (and associated properties) for $1 million, and stating that

it intended to transfer ownership of the line to CV. J.A. 55-58. The letter stated bluntly:

> If you do not accept Amtrak's offer by executing a binding letter of intent by April 1, 1988, Amtrak will have to consider that it is unable to reach agreement with Guilford or B&M on the terms of the sale of property required for intercity rail passenger service. Pursuant to Section 402(d), Amtrak will then apply to the Interstate Commerce Commission for an order requiring conveyance of the property to Amtrak.

J.A. 57.

B&M's chairman, in reply, noted that "virtually no realistic negotiations or discussions have been engaged in by Amtrak since it unilaterally and abruptly decided to cease its operation of the Montrealer." J.A. 60. The chairman stated that he was "willing to enter into negotiations promptly regarding the terms of compensation to be paid by Amtrak to operate the Montrealer over the property of B&M," but that he expected "both parties [to] enter those negotiations in good faith." J.A. 59. He stated that "if for any reason Amtrak and B&M are unable to agree upon the amounts or apportionment of the additional expenses resulting from Amtrak's operation of the line, I am willing to permit a third party, such as the Interstate Commerce Commission, to establish the proper level of compensation." J.A. 59-60. In light of that, he wrote "it appears clear that there is no need to pursue the very complex 'offer to purchase' set forth in your letter." J.A. 60. With respect to the offer itself, however, he wrote:

> Generally, however, you should be aware that the terms set forth in your letter raise several troubling issues, including, without limitation, the

> gross insufficiency of compensation, lack of specificity, excessive breadth and unnecessarily severe anti-competitive impact of the seizure, as well as the failure of the unilateral "take it or leave it" offer to satisfy the requirement of realistic, good faith negotiations prior to seizing our private property for the benefit of our direct competitor.

Id.

In response to the letter from B&M, Amtrak on March 30, 1988, wrote that if the initial offer were not accepted by April 1, it would proceed with the condemnation application. J.A. 62. Boston & Maine did not accept the offer and Amtrak filed an application before the Commission on the next business day, April 4, 1988.

Proceedings Before the Commission

Amtrak petitioned the Commission to institute a proceeding under Section 402(d) of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. 562(d) (1988), requesting an order that the Conn River Line and certain other property and contract interests of B&M be conveyed to it and that the Commission establish the terms for the sale of the Line. Pet. App. 119a-20a. In response, B&M asked the Commission to reject the application. Pet. App. 120a. On April 7, 1988, Central Vermont filed a petition with the Commission for exemption to acquire Amtrak's interests in the Line once Amtrak obtained those interests. *Id.*

On April 26, 1988, acting solely on the basis of the initial applications and responses filed by the parties, the Commission denied B&M's request to reject the application and consolidated the Central Vermont petition with Amtrak's petition. *Id.* In its April 26, 1988 order, the Commission quoted and paraphrased extensively from Amtrak's application. The Commission, in the same stroke of its pen,

"instituted," Pet. App. 133a, a proceeding to condemn the B&M segment of the Conn River Line and stated:

> Nothing in this record provides any indication that Amtrak and B&M will ever reach agreement on terms of a sale. Amtrak has sufficiently demonstrated that the parties have not been able to agree on the sale of the line to warrant the institution of a proceeding under section 402(d).

Pet. App. 131a.

On April 22, 1988, prior to the Commission's order instituting the proceeding, B&M petitioned the Commission to convert Amtrak's application under Section 402(d) to an application under Section 402(a) of RPSA. Pet. App 114a. B&M's petition pointed out that it was willing to enter into an agreement with Amtrak on reasonable terms and conditions, that it had attempted to negotiate in good faith with Amtrak and reach an agreement, but the primary obstacle has been divergent views regarding responsibility for sharing the additional costs to maintain the line to the level Amtrak desired, and that B&M was willing to have the Commission determine the amount of, and responsibility for, such additional costs. Pet. App. 114a-115a.

On May 19, 1988, the Commission denied B&M's Petition to Convert. Pet. App. 115a. In its decision, the Commission stated, again without taking evidence or conducting a hearing, that:

> Under sections 402(a)-(d) of RPSA, respectively, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads. . . . Here, Amtrak has made an election of remedies by filing its application under Section 402(d) for conveyance of the subject line, and has done so deliberately. . . . Amtrak has not requested the

> Commission to consider alternative remedies in this case. . . . Amtrak has met the statutory criteria . . . [and] is plainly entitled under the statute to a decision on the requested conveyance of the line.

Pet. App. 115a-16a.

Thereafter, the parties engaged in discovery and filed submissions with the Commission, largely directed to the issue of just compensation. On August 4, 1988, the Commission issued its decision (the "Final Decision") ordering the conveyance, establishing just compensation, imposing terms and conditions on the transaction, and granting Central Vermont's petition to acquire Amtrak's interests. Pet. App. 29a. Just compensation was determined by the Commission to be $2,373,286. Pet. App. 105a. Chairman Gradison strongly dissented from the Final Decision. Pet App. 95a. Vice Chairman Andre had previously dissented, stating that Amtrak's requirements could be satisfied by acquisition of a lesser interest. Pet. App. 111a.

Following the Commission's Final Decision, the Conn River Line was acquired by Amtrak, reconveyed to Central Vermont, and $3.2 million of the $5 million appropriated by Congress was expended to rehabilitate the line. NAP Cases Nos. 72 and 74, Further Opinion and Order (Nat'l Arb. Panel March 9, 1990). Amtrak resumed operation of the Montrealter over the northern segment of the Conn River Line, but in other respects over a different route which now adds almost two hours traveling time between New Haven and Brattleboro, Vermont, and no longer serves the major New England cities of Hartford, Connecticut and Springfield, Massachusetts. *Id.*

The Court of Appeals Decision

On petition for review by Boston & Maine, the Court of Appeals for the District of Columbia Circuit reversed and remanded for further proceedings. The court held that

the Commission failed to make the necessary findings and determinations under RPSA and that the Commission's construction of RPSA is contrary to its plain meaning. Pet. App. 5a. The court pointed out the Commission's construction of the phrase "required for intercity rail passenger service" contravenes the plain meaning of Section 402(d) as it allows the taking of property that was neither needed nor wanted by Amtrak. Pet. App. 18a-20a. The court recognized that while use of the Conn River Line was needed for the Montrealer service, Amtrak did not have to condemn the entire fee interest in order to provide that service. "Rather, what it required, and what in fact was all it sought in substance if not in form, was not title to the B&M segment but its use in a condition permitting resumption of the Montrealer service." Pet. App. 18a. The court of appeals found that, by failing to consider whether an easement or lesser interest would satisfy Amtrak's requirements, the Commission "reads the words 'interest in property' out of the statute." Pet. App. 20a. The court noted that Amtrak could have commandeered the use required under Section 402(a), and further, that Amtrak could have invoked Section 402(d) to secure an easement together with the right to improve and maintain the easement consistent with the granted use. Pet. App. 18a-19a.

Although Judge Ruth Ginsburg did not agree with certain aspects of the court's construction of RPSA, she also found that the Commission had made "no independent effort to ascertain whether the B&M-CV conveyance was in fact required to meet Amtrak's passenger service obligations." Pet. App. 27a. Because the Commission had disavowed before the court of appeals "any doubt as to B&M's competence to maintain the track in question," the Commission "shirked its obligation in this case to monitor closely Amtrak's exercise of the broad eminent domain power conferred by section 402(d) of the RPSA." *Id.*

Petitioners sought rehearing from the court of appeals and, while the petition was pending, Congress enacted the

Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4654 (to be codified at 45 U.S.C. § 562(d)) (the "1990 Amendment"). Section 9(a) of the 1990 Amendment provides that in the case of a condemnation under Section 402(d)(1) of RPSA, Amtrak may subsequently convey to a third party title or other interest in the property condemned, if such reconveyance is found by the Commission to further the purposes of RPSA. 104 Stat. at 4658.

The 1990 Amendment was brought to the attention of the court of appeals which, after consideration, denied rehearing in a *per curiam* opinion. Pet. App. 1a-3a. The court held that the 1990 Amendment "does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.'" Pet. App. 3a. The court found that while the new language plainly authorizes Amtrak to convey property subsequent to a condemnation that is otherwise valid under RPSA Section 402(d)(1), it does not affect the requirement under the statute that Amtrak's use of its eminent domain power must be justified in the first instance. Pet. App. 3a.

Judge Ruth Ginsburg adhered to her views and, in the face of the 1990 Amendment, stated:

> I remain of the view, however, that the Commission *itself* has not yet stated, with supporting findings, that the picture of an intransigent Boston and Maine Railroad drawn by Amtrak is in fact accurate.

Pet. App. 4a (emphasis in original).

SUMMARY OF ARGUMENT

At issue in this case is whether Amtrak—a private, for-profit stock corporation—can condemn another railroad's interest in property that Amtrak does not require for the

provision of intercity rail passenger service, and convey that interest to another railroad as a means of financing Amtrak's operations. The court of appeals, after careful review of the statutory scheme, concluded that this transaction was beyond the scope of the limited condemnation authority that Congress granted to Amtrak. It also held that, in any event, the Commission had failed to make the findings required by the statute or to exercise any meaningful review of Amtrak's actions. The court of appeals' conclusions are correct and should be affirmed.

A. Amtrak has not been granted the authority to take interests in property greater than those actually required for intercity rail passenger service. Nor has it been granted the unfettered discretion to dictate the terms on which it will do business with others. The Commission's contrary construction is not entitled to any deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

1. The Rail Passenger Service Act ("RPSA") is not ambiguous. Section 402(a) permits Amtrak to obtain precisely what it ultimately obtained in this case: the use of the Conn River Line in a condition suitable for intercity rail passenger service. The condemnation authority in Section 402(d) applies not to use of property, but to *acquisitions* of property. Section 402(d) limits Amtrak to only those property interests *required* for intercity rail passenger service. Far from providing Amtrak with a menu of "alternative remedies" that it can choose at will, RPSA creates a system of carefully constructed powers and limitations within which Amtrak must operate.

2. Even if the statute were ambiguous, the Commission's construction is not a permissible reading of it. The Commission's construction effectively renders Section 402(a) of RPSA a nullity, because Amtrak can evade Section 402(a)'s restrictions by "condemning" the use of tracks and provision of services under Section 402(d). It also ren-

ders parts of Section 402(d) either meaningless or redundant. It conflicts with the congressional policy of avoiding cross-subsidization of passenger service by freight service. It ignores the legislative history of Section 402(d), which makes clear that Congress intended to give Amtrak only *limited* eminent domain authority. And it ignores the settled principle that delegations of eminent domain authority to private entities must be construed narrowly. Here, the Commission has effectively given Amtrak a power—the authority to reorganize rail ownership to give lines to "better" owners—that even the Commission cannot exercise.

3. The 1990 Amendment to RPSA does not alter the fact that Amtrak is limited to taking only those property interests *required* for intercity rail passenger service. Neither the plain language of the 1990 Amendment, nor its abbreviated history, supports the contention that Congress intended to grant Amtrak the authority to take more property than is actually required, or intended to alter the structure of RPSA.

B. If RPSA were to be construed in such a way as to permit what happened here, it would violate the public use requirement of the Fifth Amendment. The net result of this proceeding is that B&M's entire interest in this property has been transferred to another private railroad, Central Vermont. The line is being used for precisely the same purpose: the common carriage of freight and passengers. There is neither any change in use, nor any public administration. Thus, the transaction is nothing more than the condemnation of private property for private benefit, and is unconstitutional.

C. In any event, even if Amtrak had the power it claims, the Commission failed to make the findings that are a necessary predicate to condemnation under Section 402(d). The Commission made no effort to determine whether, in fact, the interest Amtrak took was "required for intercity rail passenger service." It declined to consider whether

any lesser interest would satisfy Amtrak's actual needs. It concluded that the parties were, in fact, "unable to agree" solely on the basis of Amtrak's assertions in its pleadings *before* the Commission conducted any evidentiary proceeding. It failed to deal with any of B&M's evidence regarding the impairment it would suffer from the forced conveyance. The Commission, by simply deferring to Amtrak's conclusions on each of these issues, abdicated its responsibility to make reasoned findings and its order is therefore fatally flawed.

ARGUMENT

I. AMTRAK DOES NOT HAVE THE AUTHORITY TO TAKE A PROPERTY INTEREST OF A RAILROAD THAT IS NOT REQUIRED FOR INTERCITY RAIL PASSENGER SERVICE

The issue in this case is not "whether Amtrak may condemn railroad property that it intends to reconvey to another carrier," Vermont Br. 15, but whether Amtrak can, as a method of financing its operations, condemn a particular property interest that is not "required for intercity rail passenger service." Under RPSA, Amtrak has no power to take a property interest greater than that "required for intercity rail passenger service." Yet the various Petitioners[4] consistently miss this point. The problem with the Commission's action is, as the court of appeals found, that Amtrak has never demonstrated that the fee

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[4] Briefs on the merits were filed by petitioners Amtrak and Central Vermont (No. 90-1419) and by petitioners Interstate Commerce Commission and United States (No. 90-1769). A brief in support of Petitioners was filed by Respondents State of Vermont and Commonwealth of Massachusetts. The Vermont/Massachusetts brief largely parallels the Petitioners' briefs. For convenience, we may refer to all these parties jointly as "Petitioners" or, when appropriate, as "Amtrak," "ICC" or "Vermont".

interest in the Boston & Maine line was, in fact, *required* for intercity rail passenger service. It is undisputed that what Amtrak "needed" in this case was "not title to the B&M segment but its use in a condition permitting resumption of the Montrealer service." Pet. App. 18a. What it took, however, was Boston & Maine's entire interest in the property.

Section 402(d) of the Rail Passenger Service Act of 1970 ("RPSA"), 45 U.S.C. § 562(d) (1988), is one piece of a larger statutory scheme that not only created Amtrak but also governs the nation's rail system as a whole. That framework, developed over many years, has been carefully crafted to balance public interests with the very real interests of private railroads.

Petitioners do not argue that the statute specifically authorizes what occurred here. On the contrary, they claim that the statute is "ambiguous" and that this Court must therefore defer to the Commission's construction under the doctrine of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But the Commission's construction does serious violence to the language, history, and policy objectives of the statute, and ignores the settled rule that delegations of eminent domain authority to private entities must be narrowly construed. The Commission's interpretation of the statute is so arbitrary and erroneous that it is entitled to no deference.

A. The Commission's Construction Of Section 402(d) Is Not Entitled To Deference.

The Commission's interpretation is entitled to consideration only if the statute is ambiguous on the issue before the Court and the Commission has made a "permissible" reading of the statute. *Chevron*, 467 U.S. at 842-43. However, Section 402(d), when read in conjunction with the remainder of RPSA, is not ambiguous, and the Commission erred in failing to give effect to its language and purpose. Even if the statute were ambiguous, however, the Com-

mission's construction—which is not accompanied by any detailed explanation of its reasoning—nullifies many parts of the statute and creates conflicts between various provisions. The Commission's construction is not a rational reading of the statute.

1. The Statute Is Not Ambiguous.

The RPSA statutory scheme is straightforward. Each provision, and each phrase, has a distinct meaning that must be given effect.

Railroads generally possess the power to acquire property by eminent domain, through grants of authority from the various states. *See, e.g., United States v. Joint-Traffic Ass'n,* 171 U.S. 505, 569-70 (1898); *see generally* 1A Julius L. Sackman, *Nichols' The Law of Eminent Domain* § 3.231 at 3-228 (rev. 3d ed. 1973) (hereinafter *Nichols On Eminent Domain*) ("Railroad corporations which are created pursuant to the authority of general laws are possessed of all the powers of eminent domain which are granted by such general laws.") (footnote omitted). When Congress created Amtrak, the new company had no specific eminent domain authority. Congress, however, gave Amtrak the special right to run its passenger trains over any rail line in the United States. Section 402(a) of RPSA provides:

> The Corporation may contract with railroads or with regional transportation agencies for the *use of tracks and other facilities and the provision of services* on such terms and conditions as the parties may agree.

45 U.S.C. § 562(a)(1) (emphasis added). If Amtrak cannot obtain a voluntary agreement with another railroad, the statute allows Amtrak to petition the Commission for an order compelling the other railroad to grant it such "use of tracks and other facilities." If the Commission finds that the order would further the purposes of RPSA, it

can order the provision of services on such terms and for such compensation that it considers just and reasonable. *Id.* Under the statute, the other carrier is entitled to be paid for its services; compensation can be higher than the "incremental cost" to the carrier—*i.e.*, the additional cost the carrier incurs to provide the services Amtrak wants—based on "quality of service." *Id.* The statute also requires Amtrak to make its own lines available to other railroads, and in the event of a failure to agree the Commission again is required to set the proper level of compensation. *Id.* § 562(a)(2). In making such determinations, the Commission "shall not permit cross subsidization between intercity rail passenger service and rail freight services." *Id.*

In 1973, Congress amended RPSA to give Amtrak a general power of eminent domain over property "except right-of-way, land, or other property of a railroad" or a State, municipality, or government agency. RPSA § 305(d), 45 U.S.C. § 545(d) (1988). At the same time, Congress gave Amtrak the power, under certain circumstances, to take property of other railroads.[5] The statute, in its present form, allows Amtrak to condemn "property (including interests in property)" owned by a railroad *if* Amtrak is (1) "unable to agree" with the owner upon terms for the sale, and (2) the property is "required for intercity rail passenger service." 45 U.S.C. § 562(d)(1). It is thus a necessary condition of Amtrak's exercise of authority that the specific piece of property it takes be "required for intercity rail passenger service."

If these two conditions are met, Amtrak can petition the Commission for "an order establishing the need of the

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[5] This gave Amtrak, a corporation created by Congress, a right to condemn property that is generally equivalent to that of other private railroads, a fact noted in the accompanying Senate Report. *See* S. Rep. No. 226, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327.

Corporation for the property at issue" and compelling conveyance of the property to Amtrak. *Id.* That "need," under the statute, is to be considered "established" unless the Commission finds both that the conveyance would significantly impair the present owner's "ability . . . to carry out its obligations as a common carrier," and that Amtrak's need can be met by acquiring "alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation" or can be condemned from a non-railroad under Section 305(d). *Id.* Amtrak has the power to convey subsequently the property it has taken pursuant to Section 402(d). *Id.*

This statutory scheme is simple, logical, and clear. Every provision plays its part in the overall structure. Section 402(a) applies when Amtrak needs the "use of tracks and other facilities" or "the provision of services" by another railroad, the type of arrangement usually called "trackage rights." The terms of that section make it clear that the other railroad is not required to pay for whatever Amtrak needs; Amtrak must bear at least the "incremental costs" of the service.

If Amtrak, however, requires something more than trackage rights or service agreements—if it requires "property (including interests in property)"—it can proceed by eminent domain before the Commission. If the property is not owned by a railroad, Amtrak can condemn it under Section 305(d). If the property is owned by a railroad, Amtrak must proceed under Section 402(d), which governs *acquisition* of "property (including interests in property)" as opposed to *use* of "tracks and other facilities."

Under Section 402(d), Amtrak can apply for relief *if* it can demonstrate two criteria. First, the particular "property" or "interests in property" it seeks to take must be "required for intercity rail passenger service." Congress was clear on this point. It did *not* say "property that would benefit Amtrak," or "property to be used by Amtrak" or

"property that can be sold to someone else to finance Amtrak's operations," or anything like that. It said plainly that the "property" or "interest in property" that Amtrak seeks must, itself, be "required" for the provision of intercity rail passenger service. This does not mean that Amtrak must demonstrate that no other piece of property could meet its needs—*e.g.*, that there is no other rail line that could be used to carry passengers to Montreal—but simply that the particular property interest that Amtrak takes must be *required* for intercity rail passenger service.

Second, Amtrak must demonstrate that the parties were "unable to agree" on the terms of a sale. Congress could have provided that Amtrak could take property whenever it chose, but instead specifically provided that Section 402(d) was available only if the parties were "unable" to agree. The use of the term "unable" in Section 402(d) clearly requires some substantial, good faith efforts at negotiation before the section can be invoked.[6]

If Amtrak establishes that the particular property interest it seeks is "required," and that it has been unable to agree with the owner on a sale, it is entitled to condemn the property *unless* two criteria are met. First, the Commission must examine whether the conveyance would "sig-

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[6] Lower courts have consistently held that when a statutory condemnation power is conditioned on the inability of the condemnor and the condemnee to agree on terms for a voluntary sale of the property, there must be a *bona fide* effort on the part of the condemnor to acquire the property by negotiation with the condemnee before the condemnation power may be exercised. *See, e.g., Transcontinental Gas Pipe Line Corp. v. 118 Acres of Land*, 745 F. Supp. 366, 369 (E.D. La. 1990) (statute conditioned taking on inability of condemnor to acquire the property by contract or to agree with the owner as to the price to be paid); *cf. Wilson v. Union Elec. Light & Power Co.*, 59 F.2d 580, 581 (8th Cir. 1932) (statute conditioned exercise of eminent domain power on inability to acquire property by contract); *Kerr v. Raney*, 305 F. Supp. 1152, 1154 (W.D. Ark. 1969) (statute subjected exercise of eminent domain power to condition that property cannot be obtained by purchase).

nificantly impair the ability of the railroad to carry out its obligations as a common carrier." If not, Amtrak can take the property. If the conveyance would impair the railroad's operations, however, the Commission must determine whether Amtrak's obligations can be met by "acquisition of *alternative* property (including interests in property)" (emphasis added) that may be for sale or can be condemned from a non-railroad. If there is some other rail line or piece of property that would satisfy Amtrak's needs, the conveyance cannot be compelled. If not, Amtrak's need is established and the conveyance may be approved by the Commission.

There is nothing ambiguous about this. Congress used the phrase "use of tracks and other facilities and the provision of services" in Section 402(a). It used a very different phrase—"property (including interests in property)"—in Section 402(d).[7] Where Congress uses different terms in the same statute, it is presumed that they mean different things. *E.g., United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1186 (6th Cir. 1982) ("Ordinarily, the use of different language creates an inference that Congress meant different things."), *aff'd*, 464 U.S. 165 (1984); *Lankford v. Law Enforcement Assistance Admin.*, 620 F.2d 35, 36 (4th Cir. 1980) ("clear use of different terminology within a body of legislation is evidence of an intentional differentiation"). Here, "services" means *services*; "use" means *use*; "property" means *property*.

Under this statutory framework, Amtrak is not authorized to condemn any more property or any larger interest in property than is *required* for intercity rail passenger service. This does not mean that Amtrak must necessarily

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[7] Nor did Congress use the phrase "service problems" in Section 402(d) or its legislative history, contrary to the Commission's reading of the statute. Pet. App. 39a; Amtrak Br. 20. The means for Amtrak to obtain *services* from another railroad is expressly provided for in Section 402(a).

keep ownership of the property it takes. If Amtrak, for example, needed an easement to allow maintenance personnel to maintain tracks to its specifications, it is not prohibited from transferring title to that easement to a third party for the provision of such services.[8] Similarly, there may be circumstances where Amtrak cannot avoid taking more than is absolutely required, for example, if it has to take a large building and raze it to build a smaller structure.

Under the statute, the question is not who will ultimately own the property but how much property does Amtrak *require*.[9] Amtrak cannot condemn an easement where a trackage rights agreement is sufficient.[10] It cannot condemn an entire fee interest when an easement will do. It certainly cannot condemn an entire fee interest in property merely because it believes that it would be more beneficial to contract with a different owner.

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[8] Thus, if the Commission were actually to determine that rehabilitation by someone other than B&M was *required* for the provision of intercity rail passenger service—something the Commission never found and which it specifically disavowed in argument before the Court of Appeals, *see* Pet. App. 27a—it could approve the conveyance of an easement or similar interest that would permit Amtrak (or its designee) to rehabilitate and maintain the line. The balance of the ownership interest—including the right to control its use by other freight railroads—would have remained with B&M. This alternative was suggested by Vice Chairman Andre in his dissent. Pet. App. 111a.

[9] The transfer of private property to a private owner for the same use raises constitutional problems, however, which are discussed in part II, *infra*.

[10] A trackage rights agreement might not be sufficient, for example, if the tracks were going to be torn up, because Amtrak could be left with nothing but a breach-of-contract action against the other railroad. The only other time Section 402(d) has been invoked involved precisely that situation. *See National R.R. Passenger Corp.—Conveyance of Conrail Line in Wayne Cy., MI*, Finance Docket No. 30898, 1986 ICC LEXIS 132 (Sept. 29, 1986). The matter was ultimately settled. *See Conrail Abandonment in Wayne Cy., MI*, Docket No. AB-167 (Sub-No. 947N), 1987 ICC LEXIS 459 (Jan. 28, 1987).

There is nothing ambiguous about this statute, and thus no basis for any deference to the Commission's construction.

2. The Commission's Construction Of Section 402(d) Is Not A Permissible Reading Of The Statute.

Amtrak has twisted this simple framework into what the Commission described to the court of appeals as an "imaginative financing device," Pet. App. 15a, in which Amtrak pays for its operations by condemning property it does not need and selling it to the condemnee's competitors. Even if there were some doubt as to the meaning of the statute, the Commission's construction turns it into nonsense.

a. The Commission's Construction Is A Strained Reading Of Plain Language.

The Commission found that the various interconnected provisions of RPSA simply provided Amtrak with an "election of remedies" that Amtrak could invoke at its discretion. Pet. App. 39a. The Commission held that it was compelled to find that the "property" was "required for intercity rail passenger service" because Boston & Maine had not demonstrated both that the conveyance would impair B&M's common carrier obligations and that there was alternative property available for sale. Pet. App. 45a-46a.[11]

According to the Commission, a "no" answer under either Section 402(d)(1)(A) or 402(d)(1)(B) means that Amtrak must be allowed to take the property. Thus, so long as the conveyance does not "significantly impair" the other railroad's common carrier obligations (the Section

[11] As Petitioners put it, because Section 402(a) is not cross-referenced in Section 402(d), it simply "is not among the limitations on Amtrak's condemnation authority that the statute specifies." ICC Br. 13.

402(d)(1)(A) test), the Commission considers that Amtrak is entitled to any property it chooses.[12]

The Commission's interpretation must therefore be that the phrase "property required for intercity rail passenger service" means nothing more than "any property whose conveyance would not significantly impair the common carrier obligations of another railroad." This tortures the statutory language beyond endurance. It renders the phrase "required for intercity rail passenger service" either meaningless or utterly redundant.

The plain error in the Commission's construction is evident. Even if the Commission found as a matter of fact that the parties were *not* unable to agree and that Amtrak had *no* intention of using the property for intercity rail passenger service, it would still, under its construction, have to approve the condemnation as long as Amtrak offered trackage rights and just compensation to the condemnee. This stretch of the language verges on the absurd.

Similarly, the Commission completely ignores the differences in the language of Sections 402(a) and 402(d). The net effect on Amtrak of the Conn River Line condemnation under Section 402(d) is that Amtrak has obtained trackage rights on the line from Central Vermont, precisely the same sort of rights it could have obtained from Boston & Maine under Section 402(a). If the "use of tracks" is an interest that can be acquired under Section

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[12] The Commission then concludes that a conveyance will not "significantly impair" the other railroad's obligations if the other railroad receives "just compensation" and is permitted to buy trackage rights from the new owner. Pet. App. 46a. This reasoning is circular. The statute requires payment of "just compensation" whenever property is taken. Under the Commission's construction, property can be taken when it does not "impair" the common carrier obligations of another carrier (or even when it does, if alternative property is not available for sale). The Commission, however, uses the payment of just compensation itself as evidence that there is no impairment.

402(d), then Section 402(a) is a nullity. Moreover, by using Section 402(d) to obtain trackage rights, Amtrak evades the specific limitations on trackage rights agreements that Congress put in Section 402(a)—specifically, the requirement that Amtrak pay its own way. The choice between Amtrak's Section 402(a) and 402(d) powers does not, as Amtrak contends, belong to Amtrak, Amtrak Br. 19, but depends on the needs of Amtrak as determined by the Commission.

Petitioners' claim that the court of appeals' decision "strips Amtrak of an important remedy for securing fair arrangements with the freight railroads," ICC Br. 13, is therefore wrong.[13] Section 402(a) expressly provides a mechanism for such "fair arrangements" and appoints the *Commission*, not Amtrak, as the arbiter of what is "fair." What the court of appeals' decision removes is the threat that Amtrak can coerce other railroads into agreeing to *unfair* arrangements under threat of having their lines or property turned over to their competitors. No such expansion of Section 402(d) is necessary to ensure that Amtrak pays a fair price for the tracks and services it needs.[14]

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[13] The characterization of Section 402(d) as an "important remedy" may be questioned when it has been invoked only twice in 18 years and when the Commission itself characterized this case as "an extraordinary proceeding." Pet. App. 39a.

[14] Nor can the statute be read, as urged by Vermont, as granting Amtrak "broad . . . remedial authority." Vermont Br. 13. Nothing in the statute or its legislative history (*see infra*, Section 1.A.2.c.), supports Vermont's contention that the statute permits Amtrak to punish a "willfully neglectful owner," Vermont Br. 13, by transferring its property to a "more responsible carrier." *Id.* at 17. The court of appeals properly noted that the Commission made no such finding. Pet. App. 20a. Clearly, Section 402(a) was designed to offer Amtrak the means to obtain an order from the Commission for "the provision of services or the use of tracks or facilities of the railroad." 45 U.S.C. § 562(d).

b. The Commission's Construction Is At Variance With Its Own And With Congressional Policies.

One of the fundamental policies behind RPSA is Congress's determination to eradicate cross-subsidies between railroads, whether passenger, commuter, or freight. Section 402(a) itself requires Amtrak, when it uses the facilities of others, to pay its fair share, which is at least the incremental costs of service. That policy is carried out consistently through the statutes.[15] The D.C. Circuit recently noted, after evaluating congressional actions with respect to rail policy, that the legislation of the 1970s and 1980s shifted national policy "from acceptance of notions of collective railroad responsibility and cross-subsidization among carriers to congressional disapproval of those same

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[15] *See, e.g.*, 45 U.S.C. § 562(a)(2) (1988) (in considering just compensation for use of Amtrak facilities by other railroads, Commission "shall not permit cross subsidization between intercity rail passenger service and rail freight services"); *id.* § 851(a)(6) (1988) ("cross subsidization among intercity, commuter, or rail freight services is prohibited" in agreements for trackage rights over rights-of-way in the Northeast Corridor). The Commission has also consistently opposed, on policy grounds, cross-subsidization between profitable and unprofitable services. *See, e.g., Burlington Northern, Inc.—Control Merger—St. Louis-San Francisco Ry.*, 360 I.C.C. 788, 952-53 (Commission will not "under any circumstances" require indemnification for traffic diversion, because "[t]his transfer of funds would, in effect, be a massive cross-subsidization . . . of inefficient operations of another railroad"), *aff'd sub nom. Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981); *cf. Illinois Cent. Gulf R.R. Abandonment Between Herscher and Barnes*, 363 I.C.C. 690, 703-04 (1980) ("[u]nprofitable operations . . . burden [the carrier] and interstate commerce . . . [and the carrier] should not be required to continue [such] operations . . . regardless of whether it is financially capable of doing so"), *aff'd sub nom. Bloomer Shippers Ass'n v. ICC*, 679 F.2d. 668 (7th Cir. 1982); *Emergency Petition of Chicago South Shore & South Bend R.R.*, Finance Docket No. 31348, 1988 ICC LEXIS 354 (Nov. 21, 1988) (authorizing South Shore Railroad to discontinue passenger operations on money-losing line "in view of our policy of not requiring cross subsidy").

ideas." *General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1054 (D.C. Cir. 1989). *See also Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 317 (D.C. Cir. 1983) (reviewing Commission decisions; noting that "the ICC itself, as a policy matter, opposes on efficiency grounds the subsidizing of money-losing lines").

In this case, Amtrak is subsidizing its own operations by taking property from others. The subsidy is hidden, but it is real. Amtrak takes property from Boston & Maine at a low value, and transfers it to a competitor, Central Vermont, for whom the property has a high value, because it permits Central Vermont to eliminate B&M's competition in the area.[16] Central Vermont then enters into a favorable contract with Amtrak under which CV provides valuable services to Amtrak at a low price. There is a *difference in value* between what B&M received for the property and what CV would have to pay for it in a free market. That difference—a kind of "float"—is transferred to Amtrak to subsidize its operations. Thus, Amtrak in effect pays for its operations by selling its condemnation authority.

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[16] It is well established that the condemnee is not entitled to compensation based on the value of the property to the condemnor, but only based upon its fair market value to the condemnee at the time of the taking. *See, e.g., United States v. Miller*, 317 U.S. 369, 375 (1943) ("Since the owner is to receive no more than indemnity for his loss, his [just compensation] award cannot be enhanced by any gain to the taker.") (footnote omitted). Thus, even though the property may be worth more to the condemnor than to another purchaser, the condemnee does not receive the augmented value but only the "market value" at the time of the taking. *Id.* ("[A]lthough the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value.") (footnote omitted). Thus, B&M's "just compensation" bore no relation to what its line was worth to Amtrak and Central Vermont.

The Commission's determination in this case permits precisely the sort of cross-subsidization that it so vigorously resists in other contexts, and is simply inconsistent with the will of Congress and the Commission's prior precedents.

c. The Commission's Construction Flies In The Face Of The Legislative History

The plain language of the statute and the policy it is intended to further leave no doubt as to its proper interpretation. But even if resort is made to the legislative history, it is clear that Congress had no intention of giving Amtrak free rein in taking other people's property. The Section 402(d) power was sought by Amtrak to acquire *terminal* properties, as Amtrak's president explained in his testimony on the proposed amendment:

> We are really speaking here of rather modest applications of [the eminent domain] principle. We have situations which arise *primarily with respect to station locations.* For example, we have a very large station, very expensive and costly station to maintain, not needed by the public and we would like to move.
>
> Normally, the place we would want to move to is further down the railroad right-of-way, and we find it very difficult to negotiate fair and reasonable prices for the acquisition of property for that purpose.

Financial Assistance To Amtrak: Hearings on H.R. 8351 Before the Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 60 (1973) (Statement of Roger Lewis, President, National Railroad Passenger Corporation (Amtrak)) (emphasis added). Amtrak's president was questioned closely on this issue, and Representative Shoup noted that he was pleased that Amtrak intended to use

this condemnation authority "only a minimal amount of time." *Id.*

The purpose of this authority is spelled out in the Senate Report on the bill creating Section 402(d):

> At the present time [Amtrak] leases *terminal and other facilities* from various railroads. These facilities are not always best adapted to Amtrak's needs, nor is a *lease* always the most economical means by which Amtrak could fulfill its requirements for a *facility.* For instance, it might make more economic sense for [Amtrak] to *build a new facility at a different location.* This may prove impossible if the only suitable alternative property sites are owned by the railroad which is the lessor of the existing facility. Under these circumstances, there is little economic incentive for the railroad to make *alternative property sites* available to [Amtrak]. The result may be that Amtrak cannot acquire property it needs at a reasonable price. Because of the relatively inflexible site requirements of property [Amtrak] typically would want to acquire, Amtrak could easily be put in a very disadvantageous bargaining position. *It is precisely for this reason that railroads have generally been granted the power of eminent domain under State law.*

S. Rep. No. 226, 93rd Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327 (emphasis added). The senate report goes on to discuss reasonable compensation for a railroad's property acquired by eminent domain pursuant to Section 402(d): "[I]t is anticipated that the [Commission] would consider claims for additional compensation when the condemnation of an interest in a part of a railroad *building or other facility* renders the remainder of such facility useless to the railroad." *Id.* (emphasis added).

The legislative history of Section 402(d) contains no reference to Section 402(a). It makes no reference to trackage rights or the *use* of tracks. All of the relevant discussions go to Amtrak's acquisition of physical property needed for *Amtrak's* facilities. The concept that Section 402(d) was supposed to be some kind of alternative to Section 402(a) was never raised anywhere in the statute's history. On the contrary, the entire background of Section 402(d) suggests that Congress did not intend it to be used to acquire rights to *use* tracks, which Amtrak had already been granted. It is also evident that Congress contemplated a *limited* power, which belies the broad construction now urged by Petitioners.[16]

3. Private Exercises Of Eminent Domain Authority Must Be Construed Narrowly.

Finally, the Commission's construction is also at variance with settled principles of eminent domain law, which Congress clearly had in mind when drafting section 402(d). *See* S. Rep. No. 226, 93rd Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327 (reasoning behind grant of eminent domain power to Amtrak same as reason why states provide eminent domain power to railroads).

Congress created Amtrak as a private, for-profit corporation, which is authorized to issue common and pre-

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[17] Section 402(d) as originally enacted contained the further limitation "required for the *construction* of tracks or other facilities necessary to provide intercity rail passenger service." Amtrak Improvement Act of 1973, Pub.L.No. 93-146, § 9, 87 Stat. 548, 611. The statute was amended in 1976 to remove the requirement that condemnations only be for "construction of tracks or facilities." *Railroad Revitalization and Regulatory Reform Act of 1976*, P.L. 94-210, § 705(h), 90 Stat. 31, 125. This permitted Amtrak to use its condemnation powers to acquire *existing* facilities, but did not expand its authority to take property that was not itself necessary for intercity rail passenger service. *See* Sen. Rep. No. 499, 94th Cong., 2d Sess. 104, *reprinted in* 1976 U.S. Code Cong. & Admin. News 1, 119-20.

ferred stock to other railroads and individuals. 45 U.S.C. §§ 541, 544 (1988). Congress provided that Amtrak "will not be an agency, instrumentality, authority, or entity, or establishment of the United States government." *Id.* § 541.[18] As Amtrak is not an arm of the sovereign, its condemnation powers are not an exercise of the sovereign legislative power of the United States.[19]

When a legislature delegates the power of eminent domain to a private corporation operating for the public convenience, the grant of power is limited by the statute authorizing its use, and does "not include sovereign powers greater than those expressed or necessarily implied." *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946). Thus, as the Third Circuit has noted, "the eminent domain power delegated to private groups has always been more closely limited than that inherent in sovereignty." *United States v. Certain Parcels of Land*, 215 F.2d 140, 148 (3d Cir. 1954); *accord, United States v. 82.46 Acres of Land*, 691 F.2d 474, 477 (10th Cir. 1982) (where statute confers a qualified delegation of condemnation power, the "question of necessity is subject to judicial review").[20] Similarly, it has been held that when a statute is silent as to the

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[18] Amtrak is also made subject to the District of Columbia Business Corporation Act to the extent it does not conflict with RPSA. 45 U.S.C. § 541.

[19] Thus, the deference given to the sovereign's discretion in eminent domain cases such as *Shoemaker v. United States*, 147 U.S. 282, 298 (1893), is irrelevant to this case.

[20] This settled authority regarding the construction of eminent domain power in the hands of private parties, together with the plain language of Section 402(d), directly refutes Amtrak's argument, Amtrak Br. 21, that the Commission should not "second-guess Amtrak's assessment of its needs or limit each conveyance to the minimum interest the Commission might think Amtrak needed." Whether to condemn the property of another railroad is not a decision "left to Amtrak's business judgment," ICC Br. 13, but one for the Commission to make in consideration of the statutory prerequisites for the use of the condemnation power.

type of property interests to be taken, a private condemnor may only take the estate that is necessary for the particular public use justifying the taking.[21] *New Mexico ex rel. Norvell v. Callaway*, 389 F.Supp. 821, 824 (D.N.M. 1975); *Miller v. Transcontinental Gas Pipe Line Corp.*, 358 F.Supp. 1357, 1362 (W.D.La. 1973); *Superior Oil Co. v. Harsh*, 39 F.Supp. 467, 470-71 (D.C. Ill. 1941), *aff'd*, 126 F.2d 572 (7th Cir. 1942). The normal rule is that "when an easement will satisfy the purpose of the grant, the power to condemn the fee will not be included in the grant unless it is expressly so provided." 3 *Nichols on Eminent Domain* § 9.2[2] at 9-18. *See also Isley v. Bogart*, 338 F.2d 33, 34 (10th Cir. 1964); *McDonald v. Board of Miss. Levee Comm'rs*, 646 F. Supp. 449, 464 (N.D. Miss. 1986), *aff'd*, 832 F.2d 901 (5th Cir. 1987).[22]

Section 402(d), far from providing that Amtrak must take the entire property, specifically states that it may

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[21] This rule of construction of a statutory condemnation power applies in determining both the quantum of the estate and the amount of property to be acquired for public use. *McDonald v. Board of Miss. Levee Comm'rs*, 646 F. Supp, 449, 463 (N.D. Miss. 1986), *aff'd*, 832 F.2d 901 (5th Cir. 1987); *cf. Kohl Indus. Park Co. v. County of Rockland*, 710 F.2d 895, 901 (2d Cir. 1983) (county exercising qualified power of eminent domain cannot "condemn an estate in excess of that which is needed to accomplish the intended public purpose").

[22] Thus, lower courts have held that takings by public utilities must be more closely scrutinized than a condemnation by a governmental entity. *See United States v. Jotham Bixby Co.*, 55 F.2d 317, 319 (S.D. Cal.), *aff'd sub nom. C.M. Patten & Co. v. United States*, 61 F.2d 970 (9th Cir. 1932), *vacated as moot*, 289 U.S. 705 (1933); *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 688 F. Supp. 1245, 1249 (N.D. Ohio 1988). *See also* 1A *Nichols on Eminent Domain* § 3.213[1] at 3-92. Such scrutiny has been held to require that the statute be construed in a manner more favorable to the condemnee than the condemnor. *See McDonald*, 646 F. Supp. at 463-64; *Columbia Gas Transmission*, 688 F. Supp. at 1249; 1A *Nichols on Eminent Domain* § 3.213[4] at 3-102 (the rule of strict construction "is intended for the benefit of the owner who is deprived of his property against his will").

take only that property that is "required for intercity rail passenger service." The Second Circuit accordingly has found that Amtrak has only "a limited power [of eminent domain] within the meaning of *United States v. Carmack*, to condemn land 'required [for] intercity rail passenger service.'" *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 (2d Cir.) (quoting 45 U.S.C. § 545(d)(1)(B) (1982)) (citation and footnote omitted), *cert. denied*, 484 U.S. 954 (1987).

Yet the Commission read that authority so broadly that it permits Amtrak—a private party—to do the kind of restructuring of railroad ownership that Congress has not even entrusted to the Commission. The Commission itself lacks the power to decide that one railroad's property ought to be transferred to another, even when the Commission believes it to be in the public interest. *See St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 305 (1954) ("Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad"). A reading that stretches Amtrak's eminent domain power beyond even the Commission's reach must be rejected.

B. The 1990 Amendment To RPSA Does Not Change The Analysis Of The Statute.

Petitioners rely heavily on the 1990 Amendment to RPSA and, more important, its very brief legislative history. That reliance is misplaced. The 1990 Amendment is absolutely clear:

> [Amtrak] may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act.

104 Stat. 4654, 4658. The Amendment was introduced by Senator Jeffords of Vermont on the last full day of the

1990 legislative session. There were no debates, no hearings and no committee reports dealing with this amendment. Senator Jeffords' brief comments refer specifically to that aspect of the court of appeals' decision that he believed undercut Amtrak's ability to subsequently convey property it had condemned:

> The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired.
>
> . . .
>
> The court decision, however, ruled that Amtrak's subsequent transfer of the line to another railroad for rehabilitation and maintenance exceeded the court view of Amtrak's powers.
>
> This amendment clarifies that, with this and any future case . . . .

136 Cong. Rec. S17668 (daily ed. Oct. 27, 1990).

The amendment that Senator Jeffords introduced settles the point that Amtrak has statutory authority to subsequently convey property that it has properly condemned. The statute is plain and unambiguous. "In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute 'must ordinarily be regarded as conclusive.' " *United States v. James*, 478 U.S. 597, 606 (1986) (quoting *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). "When we find the terms of a statute unambiguous, judicial inquiry is complete . . . ." *Rubin v. United States*, 449 U.S. 424, 430 (1981).

As the court of appeals noted in denying rehearing, the 1990 Amendment simply has nothing to do with Section 402(d)'s requirement "that the property . . . may not be condemned in the first place if it is not 'required for intercity rail passenger service.'" Pet. App. 3a. Congress

did not change the necessary predicates to the invocation of a proceeding under Section 402(d), and certainly did not rule legislatively that they were met in this case. Thus, Petitioners' argument that the court of appeals frustrated the will of Congress and "nullified" its action, ICC Br. 28, is without merit.

Had the amendment been intended to change the statutory basis for invoking Section 402(d), it obviously would have used far different language. Petitioners ask this Court to conclude that Congress must have intended something much broader than it enacted. But as Justice Scalia noted in his concurrence in *INS v. Cardoza-Fonseca,* 480 U.S. 421, 452-53 (1987), "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."

The language of the 1990 Amendment is clear. Even if Senator Jeffords' brief remarks could be used to vary that language, they do not even purport to affect the fundamental problems with the Commission's decision that were noted by the court of appeals. The problem with Amtrak's taking, as the court of appeals noted on reconsideration, is not that it subsequently reconveyed the property interest to another, but that it condemned a property interest that was not required for intercity rail passenger service. Nothing in the 1990 Amendment alters RPSA to permit such a condemnation.

II. THE AUTHORITY CLAIMED FOR AMTRAK IN THIS PROCEEDING WOULD BE UNCONSTITUTIONAL.

If Section 402(d) of RPSA were construed in a way that permitted what has happened here, it would be unconstitutional. The Commission refused to consider the constitutional issues in reaching its construction of the statute. In her dissent, however, Chairman Gradison noted the serious Fifth Amendment problems involved in using the

eminent domain power simply to change the ownership of private property without changing its use. Pet. App. 97a. The court of appeals, although it did not reach the issues, noted that the Commission's construction raised "at least colorable Fifth Amendment problems." Pet. App. 21a.

The action of Amtrak approved by the Commission is unconstitutional because this transaction involves nothing more than the transfer of private property from one private owner to another, with no corresponding change in public use, and thus violates the Fifth Amendment.

A. The Conveyance Of B&M's Property To CV, Without A Corresponding Change In Use, Violates The Fifth Amendment To The Constitution.

The Fifth Amendment prohibits the taking of "private property . . . for public use without just compensation." U.S. Const. amend. V. The requirement of "public use" is separate and distinct from the requirement of "just compensation." This Court has "repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)). *See Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 416-17 (1896) (state utility commission could not order railroad to allow private parties to build grain elevator on railroad property even though state found that it would benefit the public).

Here, Boston & Maine had a privately owned rail line that was used for common carriage of freight and passengers. Amtrak had a contract to use that line. The result of the condemnation of B&M's line is that now Central Vermont has the same privately owned rail line that is still used for common carriage of freight and passengers. There has been no change whatsoever in the nature of the use. That Amtrak has entered into various other contracts

because it prefers dealing with Central Vermont to dealing with Boston & Maine does not alter the fact that *the use of the property is identical.* The only thing that has changed is the ownership.

But a "justifying public purpose" under *Midkiff* is not simply a desire to change the ownership of the property; it is a change in the intended use of the property taken. Thus, this Court, in *West River Bridge Co. v. Dix,* 47 U.S. (6 How.) 507, 547 (1848), affirmed the doctrine that the sovereign has the power to condemn property where it "vests both a new benefit and use . . . in the public." In *Long Island Water-Supply Co. v. City of Brooklyn,* 166 U.S. 685, 694 (1897), this Court noted the distinction between a true public use—such as the municipal utility ownership at issue—and merely "turning property from one private corporation to another." As Justice Holmes later noted, cases like *West River Bridge* and *Long Island Water-Supply* "show the difference between an attempt to transfer property from one private person to another and the taking of it for public administration by a public body." *Galveston Wharf Co. v. City of Galveston,* 260 U.S. 473, 476 (1923).

It has therefore been consistently held in state and federal courts that where the condemnation merely changes owners, without changing the use to which the property is put, there is no "public use" involved, and the condemnation is unconstitutional. *See Washington ex rel. Harbor Boom Co. v. Superior Court,* 65 Wash. 129, 133 (1911) ("legislature is powerless to authorize" one boom company to take property of another and dedicate to identical public use); *Ingalls v. Ingalls,* 150 Mass. 57 (1889) (holding unconstitutional the authorization of a transfer by eminent domain of public library from one private owner to another for the same use). *See also Illinois Cities Water Co. v. City of Mt. Vernon,* 144 N.E.2d 729, 733 (Ill. 1957); *NL Indus., Inc. v. Eisenman Chem. Co.,* 645 P.2d 976, 980 (Nev. 1982). Thus, where one railroad tries to take the

property of another, and the railroad will be used for the same purpose, there is no "public use" and the taking is improper. *See Philadelphia, Morton & Swarthmore St. Ry.'s Petition*, 203 Pa. 354 (1902) (holding unconstitutional statute authorizing one street railway to appropriate the use of another's tracks); *Illinois Cent. R.R. v. Chicago, Burlington & N. R.R.*, 122 Ill. 473 (1887) (dismissing condemnation petition of one railroad company to the extent it would take the right of way of another railroad company for railroad purposes).

This issue has rarely been litigated in federal court. As far as Respondent can determine, no private corporation created by the United States has ever tried to use the power of eminent domain to take another private entity's property and transfer it for the same use to another, with whom it hopes to get a better deal. On the contrary, every case this Court has been called upon to decide has involved situations where the property was being taken for public administration, or where the use to which the property was being put was changed in a significant way.[23]

Petitioners point to this Court's decisions in *Midkiff* and in *Berman v. Parker*, 348 U.S. 26 (1954), both of which involved condemnation of private property for ultimate conveyance to other private parties. *See* ICC Br. 23-24 n.19; Amtrak Br. 42. But those cases, far from supporting the type of transaction that occurred here, both involved substantial *changes* in the use of the property, not the mere transfer of an interest from one person to another.

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[23] *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (large estates used for multiple tenancies condemned to create fee ownership in single-family residential lots); *Berman v. Parker*, 348 U.S. 26 (1954) (slum dwellings condemned to create redeveloped zone); *Carmack*, 329 U.S. at 238-39 (site used by state government taken for construction of federal post office); *West River Bridge*, 47 U.S. (6 How.) at 547 (converting private toll bridge to public free bridge); *Long Island Water-Supply Co.*, 166 U.S. at 694 (converting private utility property to public ownership); *Galveston Wharf*, 260 U.S. at 476 (same).

In *Midkiff*, the legislature did not merely take one lessor's oligopolistic landholding and convey it to a competing lessor, who would continue to lease homes to individuals; it took the property for the purpose of breaking it up into small, individually owned pieces to further a specific public policy favoring land reform and individual homeowners. In *Berman*, the legislature did not simply take an office building from one private party and give it to another to use as an office building; it determined that slum clearance and urban renewal required the complete redevelopment of an area with a correspondingly fundamental change in character.

Both *Midkiff* and *Berman*, moreover, involve specific determinations made by the legislative authority. Where the legislature speaks specifically, courts do not set aside such determinations "unless the use be palpably without reasonable foundation." *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896), quoted in *Midkiff*, 467 U.S. at 241. But, as noted above, where such power is exercised by a *private* entity, none of this legislative deference applies.

Neither this Court nor any other has ever held that private property can be forcibly conveyed from one private person to another simply because the sovereign believes the new owner would do a better job of running it, or because the sovereign believes it would get a better contract from the new owner.[24] The fundamental problem of the petitioners' positions is underscored, where, as here,

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[24] The sovereign has the power to award or withdraw franchises or permits for certain public services on such grounds. It can, for example, decide that one carrier should not be authorized to provide certain classes of services, which could in certain situations have the effect of putting the carrier out of business. But even the sovereign cannot take the privately owned equipment and facilities of such a carrier and convey them forcibly to a competitor even if it believes the competitor will do a better job in providing services.

it is not the sovereign making such a determination, but the officers and directors of a private for-profit stock company. Under these circumstances, permitting Amtrak to convey to another the entire interest it takes, with no change in use, violates the Fifth Amendment.

B. The Commission Had The Responsibility To Monitor Closely The Exercise of Amtrak's Power Of Eminent Domain.

It is the Commission's job to ensure that Amtrak's condemnation authority is limited to property that is "required for intercity rail passenger service." The Commission, however, abdicated its responsibility here. By holding that it was for Amtrak, not the Commission, to elect the statute under which it would proceed and to decide the extent to which it would condemn the particular property, Pet. App. 39a, the Commission gave unfettered authority to a private company.

Under the Commission's construction of RPSA there is, in fact, no limit on the property that Amtrak may take, so long as it pays for that property and gives trackage rights, if necessary, to the condemnee. No private entity can constitutionally exercise that kind of unfettered domain over the property of others.[25] The Commission's construction is therefore impermissible and should be rejected.

III. THE COMMISSION FAILED TO FIND THE NECESSARY FACTS TO JUSTIFY THE TAKING AT ISSUE.

Even if Amtrak had the authority it claims, and the constitutional ability to exercise it, its condemnation of

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[25] In another context, this Court has struck down statutes which allowed private parties to exercise control over the property of others without effective state involvement regulating such conduct. *E.g., Fuentes v. Shevin*, 407 U.S. 67 (1972) (private parties with power to replevy property of others without state control); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (statute giving private party a veto power over liquor license applications).

B&M's line is still fatally defective because the Commission completely failed to make the findings necessary to justify this taking.

The statute unambiguously requires, as a condition of any condemnation, that (1) the parties be "unable to agree" on the sale of the property, and (2) the property to be taken be "required for intercity rail passenger service." The Commission must make appropriate findings on these issues before any property can be taken. All of the judges on the panel below found that the Commission failed to ascertain whether the conveyance from B&M to CV was in fact required to meet Amtrak's passenger service obligations. Pet. App. 18a, 27a. Subsequent to the 1990 Amendment to RPSA, the majority reiterated its earlier conclusion that the Commission had failed to make adequate findings under Section 402(d) and, therefore, had not properly determined that the condemnation of the B&M line was required for intercity rail passenger service. Pet. App. 3a. Likewise, Judge Ginsburg found that the 1990 Amendment did not change the fact that the Commission had simply failed to make findings and provide a "satisfactorily reasoned statement" in support of its decision. Pet. App. 4a.

It is axiomatic that where Congress puts specific conditions on the exercise of a particular statutory power, the agency charged with administration must satisfy those conditions before it can exercise the power. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962); *ICC v. J-T Transp. Co.*, 368 U.S. 81, 93 (1961); *Thomas Paper Stock Co. v. Porter*, 328 U.S. 50, 53-54 (1946). Thus, when Congress says, "If *X* occurs, the agency may do *Y*," the agency must find that *X* did, in fact, occur before it can do *Y*. An agency determination that does not find facts sufficient to satisfy the statutory predicate is fatally flawed.

Here, Congress placed explicit conditions on any exercise of the condemnation power by Amtrak. The Commis-

sion resolved these issues *before* the condemnation proceeding was instituted and hence it could not and did not make the necessary factual findings.

Under section 402(d), Amtrak must first show that it has been "unable" to agree on terms for the sale of the property. That requires a finding of an *inability* to agree, not merely a refusal on Amtrak's part to negotiate. As noted above, this requires good faith, *bona fide* negotiations between the parties. Amtrak made a single take-it-or-leave-it offer to Boston & Maine at an extremely low price that it knew would not be accepted as proposed. J.A. 94.[26] Boston & Maine responded by seeking negotiations but was rebuffed by Amtrak. J.A. 59, 111-112. Moreover, at the time Amtrak made its offer, it had already reached agreement in principle with Central Vermont for the sale and rehabilitation of the line. J.A. 92-95. The facts certainly show that Amtrak was *unwilling* to reach an agreement with Boston & Maine, but the Commission adduced no evidence that Amtrak was *unable* to do so.

Second, the Commission must find that the property interest to be taken is one "required" for intercity rail passenger service. The Commission must find that the property to be taken—both the amount and the type of estate—is required for the public purpose for which it is sought. Anything in excess of what is "required" is not authorized by the statute and would, in fact, not be for the public use.[27] As the court of appeals found, "[W]hat

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[26] The $1 million offer was made on March 18, 1988. J.A. 55. On August 4, 1988, the Commission established "just compensation" at $2,373,286. Pet. App. 105a. B&M's appeal challenged the amount fixed by the Commission as too low; that issue was not reached by the court of appeals and is not before this Court. Pet. App. 13a-14a.

[27] Intercity rail passenger service is, in general, a "public use." All railroads, in fact, are considered "public uses." *See Western Union Telegraph Co. v. Pennsylvania R.R.*, 195 U.S. 540, 573 (1904). But the fact that Amtrak generally engages in public services does not obviate

[Amtrak] required, and what in fact was all it sought, in substance if not in form, was not title to the Boston & Maine segments but its use in a condition permitting resumption of the Montrealer service." Pet. App. 18a. Yet the Commission did not consider whether a trackage rights agreement would be sufficient. Nor did it examine whether Amtrak needed all of B&M's interest, or whether a trackage rights agreement together with an easement, or a license, or a lease, or any other lesser estate in the property would be sufficient.[28]

Amtrak contends that what it obtained was not just the use of the B&M tracks but also their rehabilitation. Amtrak Br. 10. But Amtrak itself paid for that rehabilitation, and the record contains no finding that a conveyance to Amtrak was necessary for that rehabilitation.[29] For reasons having to do with business considerations rather than any public interest principle, Amtrak preferred to make Central Vermont, rather than Boston & Maine, the beneficiary of federal funds. The Commission made no finding that Boston & Maine could not have adequately upgraded the line, and expressly disavowed any doubt as to Boston

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the requirement that the Commission specifically find that the particular property sought to be condemned by Amtrak—here, the fee simple interest in the Conn River Line—be "required" for that public use.

[28] Amtrak's argument, Amtrak Br. 30-31 n. 20, is that it is only necessary for the Commission to determine that Amtrak intends to use the rail line "in connection with" its rail passenger operations, in order for the Commission to go on to make findings under Sections 402(d)(1)(A) and (d)(1)(B). By contending that "in connection with" is equivalent to "required," Amtrak would undermine any limitation on the use of the section 402(d) authority.

[29] In fact, when Congress appropriated the funds used for the rehabilitation, it anticipated that B&M would be performing the repairs and restoration work under an agreement with Amtrak. *See Making Supplemental Appropriations for the Fiscal Year Ending Sept. 30, 1987*, H.R. Conf. Rep. No. 195, 100th Cong., 1st Sess. 94 (1987); *see also* Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447.

& Maine's ability to do so before the court of appeals. Pet. App. 27a. There is therefore no merit in Amtrak's contention that it "needed" to take the entire B&M line in order to use it.

Third, the Commission failed to make sufficient findings on the issue whether the requested condemnation would significantly impair Boston & Maine's ability to carry out its obligations as a common carrier, or whether Amtrak's needs could be adequately met by the acquisition of an alternative property (or interest in property) available for sale to Amtrak or through its Section 305(d) condemnation power.[30] Because Boston & Maine had made an explicit claim of significant impairment before the Commission, the court of appeals properly refused to uphold a determination that "dismisses [B&M's] detailed exposition with the cursory statement that its ability to carry out its common carrier obligations will be adequately protected by the terms of a trackage rights agreement dictated by its competitor, Central Vermont." Pet. App. 19a. The Commission simply failed to consider the ramifications of requiring B&M to take trackage rights from its principal rival in the condemnation proceeding.[31]

Judge Ginsburg, concurring in the judgment of the court of appeals, specifically noted that no Commission determination of any of these issues "can be gleaned from this record." Pet. App. 27a. She noted that the Commission

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[30] Amtrak categorically states that no "lesser interest" in the B&M property was available, Amtrak Br. 23; but Amtrak made no offer to purchase a lesser interest.

[31] That the Commission reviewed the trackage rights agreement among Amtrak, CV and B&M in a subsequent proceeding, and imposed what it considered to be reasonable terms for B&M's use of the Conn River Line, does not cure the problem. The statute clearly requires that the Commission consider the impairment that arises from the *conveyance*, which requires its consideration at the condemnation proceeding stage. This the Commission failed to do.

conceded before the Court of Appeals that it had made no independent effort to ascertain whether, in fact, the Conn River Line conveyance was required for intercity rail passenger service, and that it had "disavowed" any doubt as to B&M's competence to maintain the line in question. *Id.*

As Judge Ginsburg concluded, even if Amtrak had the power it sought, "the ICC shirked its obligation in this case to monitor closely Amtrak's exercise of the broad eminent domain power conferred by Section 402(d) of the RPSA." *Id.*

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed. The mandate of the court of appeals should issue, and this matter should be returned to the Commission so that Boston & Maine may recover its property from Central Vermont.

Respectfully submitted,

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December 1991